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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTHERN CALIFORNIA
San Jose Division**

**BINYAM MOHAMED;
ABOU ELKASSIM BRITEL;
AHMED AGIZA;
MOHAMED FARAG AHMAD
BASHMILAH;
BISHER AL-RAWI**

Plaintiffs,

v.

JEPPESEN DATAPLAN, INC.

Defendant.

Civil Action No. 5:07-cv-02798 (JW)

**DECLARATION OF BEN WIZNER IN
SUPPORT OF PLAINTIFFS'
OPPOSITION TO UNITED STATES'
REQUEST FOR A STAY AND
DEFENDANT'S MOTION TO CHANGE
TIME**

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25 **only.**

DECLARATION OF BEN WIZNER

I, Ben Wizner, do hereby declare as follows:

1. I am a staff attorney in the National Legal Department of the American Civil liberties Union Foundation (ACLU), which is counsel for Plaintiffs Binyam Mohamed, Abou Elkassim Britel, Ahmed Agiza, Mohamed Farag Ahmad Bashmilah, and Bisher al-Rawi in the matter of *Mohamed, et al, v. Jeppesen Dataplan, Inc.*, No. C-07-2798-JW. I am a member in good standing of the bar of this Court. This declaration is based upon my personal knowledge and, if called upon to do so, I could and would testify competently thereto.

2. On August 31, 2007, my colleague and co-counsel Steven Watt, a Senior Staff Attorney in the ACLU's Human Rights Program, informed me that he had been contacted by Dan Collins, counsel for the Defendant. According to Mr. Watt, Mr. Collins had notified him that he had received a telephone call from Michael Abate, an attorney in Civil Division of the United States Department of Justice. Mr. Abate had contacted Mr. Collins to advise him that the United States was considering its options with regard to the case, and was requesting additional time in which to do so. Based on my conversation with Mr. Watt, I understood that Mr. Collins had proposed that the Plaintiffs, Defendant, and the United States agree to a schedule that would put on hold the previously stipulated briefing schedule to permit the United States to intervene, if it chose to do so, before Defendant responded to Plaintiffs' complaint.

3. Mr. Watt and I discussed how to respond to Defendant's proposal consistent with the best interests of our clients. We also consulted our co-counsel in this matter. As Mr. Watt was leaving the office early that day because of the Labor Day holiday, I agreed to contact Mr. Collins to advise him of Plaintiffs' position.

4. I contacted Mr. Collins by telephone on the afternoon of Friday, August 31, 2007. I informed Mr. Collins that it was my understanding, based on previous

1 discussions and stipulations, that Defendant intended to mount a legal, as opposed to
2 factual, defense. In that event, I explained, it was Plaintiffs' position that any
3 intervention by the United States for the purpose of asserting the evidentiary state secrets
4 privilege would be premature as a matter of law. I further suggested to Mr. Collins that
5 Plaintiffs might consider a modification to the briefing schedule in the event that all
6 interested parties – Plaintiffs, Defendant, and the United States – agreed jointly to
7 request a status conference. Mr. Collins stated that he would advise counsel for the
8 United States of the content of our discussion.

9
10 5. On Wednesday, September 5, I received an email message from Michael
11 Abate of the Department of Justice. In it, Mr. Abate wrote that the United States was
12 considering filing a statement of interest informing the Court that it was considering
13 whether and how to participate in this action, decisions that it would make by October
14 19, 2007. Mr. Abate sought Plaintiffs' consent to a stipulation "deferring the defendant's
15 obligation to respond to the amended complaint until after the court considered any
16 pleadings the government may file on or before October 19."

17 6. I responded by email to Mr. Abate that same day. I wrote that it was
18 counsel's view that it would be contrary to our clients' interests for us to facilitate the
19 filing of what we believed would be a premature dispositive motion by the United States.
20 I further wrote that my response assumed that the government was considering whether
21 to invoke the state secrets privilege, but that if I was incorrect, Plaintiffs were willing to
22 reconsider their opposition to a modification of the briefing schedule.

23 I declare under penalty of perjury of the laws of the United States that the
24 foregoing is true and correct.

25 

26 Ben Wizner

Respectfully submitted,

/s/ Ben Wizner

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